

United States Government

Department of Energy

Rocky Flats Office

memorandum

DATE: SEP 27 1993

REPLY TO
ATTN OF: ERD:SRG:11140

SUBJECT: Notice of Violation for OU2 Notification as per September 16, 1993 Secretarial Guidance

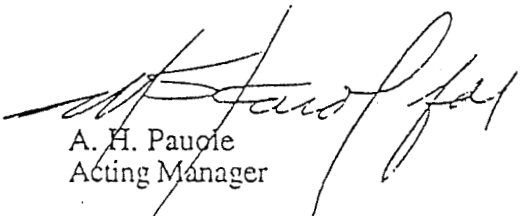
TO: Associate Deputy Secretary for Field Management, FM-1, HQ
General Counsel, GC-1, HQ
Assistant Secretary for Environmental Restoration and Waste Management, EM-1, HQ
Assistant Secretary for Environment, Safety and Health, EH-1, HQ

In compliance of the September 16 and August 18, 1993 memoranda from the Secretary, we are providing 10-day follow-on information from our September 13, 1993 memorandum (ERD:HR:10795, attached). This information is required within 10 days of a Notice of Violation, as specified in the guidance information entitled: "Guidance on Management Procedures for Addressing responsibility for Violations of Environmental Requirements and Related Fines and Penalties."

The Notice of Violation was received September 10, 1993 (attached) from U.S. Environmental Protection Agency (EPA) and the Colorado Department of Health (CDH) for missing a milestone under our InterAgency Agreement (IAG). The missed milestone is for the Final RCRA Facilities Investigation/Remedial Investigation (RFI/RI) Report for Operable Unit 2 (903 Pad, Mound, and East Trenches).

In consultation with EM-40, we have agreed to dispute the Notice of Violation through the Dispute Resolution process laid out in the IAG. The basis of the dispute is that we have not missed the August 9, 1993 milestone for the Final RFI/RI Report at this time (due to an August 12, 1993 (attached) EPA/CDH "stop the clock" authorization on the schedule as of June 21, 1993), but will miss it in the future. Once the schedule "stop the clock" has been lifted, we will miss the milestone by approximately nine months, this makes us subject to additional stipulated penalties of up to \$355,000 (1 week at \$5,000 and 35 weeks at \$10,000).

We will keep all parties informed on the progress on the Dispute with EPA and CDH. If you have any questions about this, please contact James Hartman at 966-5918.



A. H. Paule
Acting Manager

Attachments

FM-1, GC-1, EM-1 & EH-1
ERD:SRG:11140

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cc w/Attachment:
A. Rampertaap, EM-453
R. Schassburger, ERD, RFO
M. Roy, OCC, RFO
H. Rose, ERD, RFO
S. Grace, ERD, RFO
N. Hutchins, EG&G
W. Busby, EG&G
A. Primrose, EG&G

Within 24 hours:

(A) The nature of the alleged violation and of the environmental threat posed thereby:

The nature of the violation is the failure to meet the InterAgency Agreement (IAG) milestone for submittal of the Final RCRA Facilities Investigation/Remedial Investigation (RFI/RI) Report for Operable Unit 2 (903 Pad, Mound, and East Trenches). We missed the milestone for the Draft RFI/RI Report, due March 12, 1993 and as a result we are missing subsequent milestones. The Final RFI/RI Report, due August 9, 1993, is the second milestone to be missed for Operable Unit 2. We received the Notice of Violation on September 10, 1993 (attached).

There is no immediate environmental threat posed by this alleged violation of the IAG.

(B) whether the alleged violation has been corrected, or is continuing:

The alleged violation is continuing. The U.S. Environmental Protection Agency (EPA) and Colorado Department of Health (CDH) have told us verbally, that once they receive the Draft RFI/RI Report, they will assess the amount of the stipulated penalties and then correct the schedules to put us back "on track."

(C) the basis for the regulatory authority's discovery of the alleged violation (e.g., Department or contractor self-reporting or external regulatory inspection):

We informed the EPA and CDH in writing on August 12, 1993 that we were going to miss the milestone for the Draft as well as the Final RFI/RI Reports.

(D) whether fines or penalties are being assessed and, if so, the amount: and

We have been notified that once we submit the Draft RFI/RI Report, the regulators will assess the amount of the stipulated penalties. We are subject to stipulated penalties of up to \$5,000 for the first week, and \$10,000 a week thereafter for each missed milestone. Since the stipulated penalties are "additive," and we will be subject to the \$5,000 and \$10,000 amounts for each missed milestone. We won't know the actual amount until we meet the milestones and negotiate with EPA/CDH.

Before the "stop the clock" authorization from the regulators was received, we were anticipating approximately a nine month delay in both the Draft and Final RFI/RI Reports. Once the schedule is resumed, we still anticipate a nine month delay. This would make up subject for up to \$355,000 for each missed milestone (one week at \$5,000 and 35 weeks at \$10,000 equals \$355,000), or \$710,000 in stipulated penalties.

(E) whether duplicative notices were issued to the Department and to a contractor for the same alleged violation.

The notice was sent to DOE only.

Attachment to ERD:SRG:11140

Within 10 working days:

(A) the degree of responsibility of the Department and its contractor for the alleged violation, regardless of who received the notice;

In this case, DOE has accepted responsibility for the violation of the IAG for missing the milestone for the Draft RFI/RI Report. This is based upon the March 29, 1993 memorandum from R. P. Whitfield to the Acting Manager, Rocky Flats (attached).

(B) whether the Operations Office or any affected contractor disagrees with the legal or factual grounds for the alleged violation;

Although we have told the EPA and CDH that we agree to the stipulated penalties for missing the milestone for the Draft RFI/RI Report, we disagree that we are currently in violation of the milestone for the Final RFI/RI Report.

A "stop the clock" authorization was received from EPA and CDH on August 12, 1993 (attached), that, retroactively stopped the schedule as of June 21, 1993. Since the missed milestone date for this alleged violation was August 9, 1993, we maintain that we have yet to miss the milestone. However, once the schedule is restarted, we will ultimately miss the milestone.

(C) whether the issuing regulatory authority's proposed resolution should be accepted, or whether an attempt should be made to contest the notice or to negotiate a different settlement; and

In coordination with EM-40, we have agreed to dispute the notice of violation. The Dispute will follow the Dispute Resolution process laid out in Part 19 of the IAG. We will argue that the schedule was stopped as of June 21, 1993, therefore, we could not have missed the August 9, 1993 date at this time.

We emphasize that although not currently in violation of the IAG milestone for the Final RFI/RI Report, once the clock is restarted, we will ultimately miss the milestone.

(D) the actions taken, or proposed, to prevent similar alleged violations from occurring in the future.

The primary reason for the missed milestone for the Draft RFI/RI Report was the failure to coordinate with EPA/CDH in a timely manner to resolve the FY92 funding/scope-increase issue and to reach agreement on a schedule extension. We have since developed a closer working relationship with EPA/CDH to identify issues, early on, that potentially impact IAG deliverables and milestones.

As noted in D above, we maintain that have not currently missed the milestone. However, we will be in the future, once we revise the schedule can be determined.

ERD:SRG:11736

RESOLUTION OF DISPUTE

BACKGROUND

- 1) June 29, 1993 letter (93-DOE-07580), DOE to EPA/CDH, asking for clarification on the approach for the Operable Unit (OU) No. 2 Baseline Risk Assessment.
- 2) July 21, 1993 letter (93-DOE-08449), DOE to EPA/CDH, requesting that the "...clock" be stopped on the schedules for Operable Units 1 through 7, until such time that we receive and agree to guidance on the methodology for the baseline risk assessments..."
- 3) August 12, 1993, letter, EPA/CDH to DOE, notifying that our July 21 request to stop the "clock" was granted: "...because EPA and CDH believe that stoppage of work is necessary until such time as an agreement is reached among the parties to the IAG on how the above issues... will be resolved and implemented..." The schedule stopped as of June 21, 1993, for Operable Units 1, 2, and 7 and August 12, 1993, for Operable Units 4, 5, and 6. Operable Unit 3 as of July 23, 1993..."
- 4) August 12, 1993, letter (93-DOE-08698), DOE to EPA/CDH, notification that we would miss the August 9, 1993, milestone for the OU2 Final RFI/RI Report.
- 5) August 18, 1993, memorandum (ERD:SRG:08450), DOE to EG&G, authorization for EG&G to stop work on certain parts of the RFI/RI Reports for OUs 1-7.
- 6) Dispute Resolution Committee (DRC) determination (made verbally within 5 days of the August 12 EPA/CDH letter) that the schedule stoppage was appropriate, as per Part 24 (Work Stoppage) of the IAG.
- 7) Undated letter, (received DOE mailroom September 10, 1993), EPA/CDH to DOE, notification that "...By failure to submit that document [Final RFI/RI Report] ..., DOE has not met the milestone and is in violation of the IAG. ... you are hereby notified that stipulated penalties are accruing pursuant to Part 19 of the IAG ... penalties will begin to accrue on the date DOE receives this notice of violation..."
- 8) September 24, 1993, letter (93-DOE-10930), DOE to EPA/CDH, invoking Dispute Resolution on "...whether or not we are currently in violation of the IAG by missing the August 9, 1993, milestone for submittal of the Final ... RFI/RI ... Report..."

RESOLUTION OF DISPUTE:

- A. It is agreed that DOE is in violation of the IAG for the missed Final RFI/RI Report submittal milestone. This violation continued for the period of August 9, 1993 through Augusts 12, 1993 (when the clock was stopped). In light of the retroactive nature of the EPA/CDH August 12 stop work letter, EPA agrees not to assess stipulated penalties for the period August 9 - 12, 1993.
- B. It is understood that there is no provision in the IAG to lift work stoppages agreed to by the Dispute Resolution Committee (DRC), as prescribed by Part 24 of the IAG, Work Stoppage. The IAG Coordinators agree to recommend to the Parties of the IAG to amend the IAG to incorporate language on how to rescind a work stoppage. The proposal to amend the IAG would be according to Part 41 of the IAG, Amendment of Agreement.

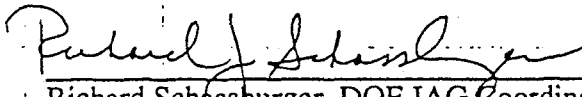
RESOLUTION OF DISPUTE, PAGE 2
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The proposed amendment to the IAG would be the addition of the text below to the existing language of Paragraph 164:

Any Party may request a work stoppage order to be rescinded. Such request shall be made in writing by the DRC member of the requesting Party, sent to the DRC members of all other Parties, and shall state the reason as to which the work stoppage order should be rescinded. If the DRC unanimously agrees to rescind the work stoppage order, work shall resume immediately, unless the DRC establishes an alternate time upon which the work shall resume. If the DRC fails to reach unanimous agreement within five (5) business days of the request to rescind the work stoppage, the issue shall be referred to the SEC. Once the issue is referred to the SEC, the Lead Regulatory Agency member of the SEC shall render its decision within five (5) business days and work shall proceed accordingly. The procedures of Parts 12 and 16 shall apply as appropriate.

- C. The Coordinators agree to use the above process to rescind the work stoppage currently in effect while the Parties undertake formal procedures to amend the IAG. At the time that the work stoppage is lifted, DOE shall submit proposed new milestones for OU 2, pursuant to Part 42, Extensions, of the IAG. The proposed new milestones shall be based on an extension period equivalent to the time in which work was stopped.

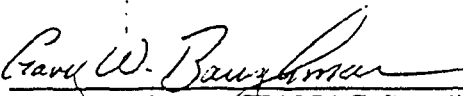
We, the IAG Coordinators, agree that the above resolves the dispute invoked by DOE on September 24, 1993 (background reference #8).


Richard Schassburger, DOE IAG Coordinator

10/14/93
date


Martin Hestmark, EPA IAG Coordinator

10/14/93
date


Gary Baughman, CDH IAG Coordinator

Oct. 14, 1993
date